United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

76-1336

TO BE ARGUED BY
Henry J. Boitel

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76 - 1336

B P/S

UNITED STATES OF AMERICA,

-vs.-

ALPHONSO C. POWE, JR.,

Defendant-Appellant.

On Appeal From the United States District Court
for the Southern District of New York

BRIEF AND APPENDIX IN BEHALF OF
APPELLANT ALPHONSO C. POWE, JR.

HENRY J. BOITEL
Assigned Counsel for Appellant
Alphonso C. Powe, Jr.
233 Broadway
New York, New York 10007
(212) RE 2-8104

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76 - 1336

UNITED STATES OF AMERICA,

-vs.-

ALPHONSO C. POWE, JR.,

Defendant-Appellant.

On Appeal From the United States District Court
for the Southern District of New York

BRIEF IN BEHALF OF APPELLANT ALPHONSO C. POWE, JR.

Alphonso C. Powe, Jr., [hereinafter, "The Defendant"] appeals from a judgment of conviction entered against him after a trial by jury before the Honorable Inzer B. Wyatt in the United States District Court for the Southern District of New York.

The defendant was convicted upon an indictment which charged him, alone, with: Count I - conspiracy to embezzle funds from a bank insured by the Federal Deposit

Insurance Corporation (18 U.S.C. § 371); Count II - aiding and abetting such embezzlement (18 U.S.C. §§ 2 & 656); and Count III - knowingly transporting such embezzled funds from New York to Pennsylvania and elsewhere (18 U.S.C. §§ 2 & 2314).

On September 5, 1975, the defendant was sentenced to serve concurrent terms of three years imprisonment on Counts I and II; imposition of sentence on Count III was suspended, and the defendant was placed on probation for a period of three years, with the special condition that he make restitution at such time and in such amounts as the probation office may determine.

Questions Presented for Review

1. Was the defendant deprived of a fair trial by the receipt in evidence of a prior criminal act, as to which the defendant was, allegedly, an aider and abettor, where the sole source of information concerning both the criminality of the prior act and the defendant's knowing participation in it, was the very same witness whose testimony was indispensible to the conviction in the present case? Was the error aggravated by virtue of the fact that the prior act was not, in fact, similar to the crime charged herein? Was it further aggravated by the trial court's belief that it was "required to admit" the evidence?

2. Was it error for the Court to fail to instruct the jury that neither the defendant's presence on the trip out of New York and to California, nor his participation in the spending of the embezzled money, was, in and of itself, sufficient evidence upon which the defendant could be convicted of the crimes charged?

Statement of Facts*

A. Summary of the Facts.

On February 6, 1975, Patricia Carter, an employee of the Chemical Bank branch located at 425 Park Avenue, placed approximately $31,000.00 in her purse, and left for her lunch hour - never to return. Around the corner from the Bank she met the defendant. The principal question of fact at trial was whether the defendant was aware, at that point, that Miss Carter had actually intended to and did embezzle the funds in question. The defendant, testifying in his own behalf, said that he had arrived in the vicinity of the Bank, solely for the purpose of taking Miss Carter to lunch, and that it was not until a later point in the day that he learned that she had embezzled the funds.

Following the street corner meeting, the two went to a bar, then took a taxi to Philadelphia, where they remained overnight, and then a train to St. Louis, Missouri, where they remained a few days, and then a plane to Oakland, California, where they set up housekeeping as Mr. and Mrs.

---

*References herein preceded by "Tr." are to the original trial transcript; references herein preceded by "A." are to the Appellant's Appendix filed herewith.

Louis Davis. They split up in May, 1974.

In August, 1974, Miss Carter surrendered herself to Federal authorities in California. Following her transfer to New York, she entered a plea of guilty to charges growing out of the embezzlement, and was sentenced to three years probation. Based upon Miss Carter's testimony, the defendant was indicted. Her testimony was the central and indispensible government proof against him at trial.

The other trial witnesses were: Anthony Dapuzzo, an administrative officer of the Chemical Bank who testified concerning the amount of the money shortage which was uncovered at Miss Carter's teller's cage ($31,192.26), and concerning the fact that the Bank was insured by the Federal Deposit Insurance Corporation; Jack Applegate (Tr. 103, et seq.), an Oakland, California used car dealer, who testified that the defendant purchased a used Cadillac in early September, 1973 at a cost of $7,551.00 - and paid for it in cash. (Tr. 105-107). Applegate further testified that the defendant, together with a lady, sold the same car back to him in May, 1974, for $5,300.00 (Tr. 108); (GX 7, 8 & 9); Frazer Henry Hewitt (Tr. 110, et seq.), an Oakland, California vending machine operator, who testified that in November, 1973, the defendant purchased from him three hundred vending machines at a cost of $9,000.00, which he offered to pay in cash (Tr. 111-114; GX 10). In September, 1974, the defendant returned the machines to Hewitt, requesting that Hewitt sell them and forward the money to the defendant at a New

York address (Tr. 114; GX 11).

B. The testimony of Patricia Carter.

At the time of the events of this case, Miss Carter was eighteen years old; at the time of trial, she was twenty-one years old. Following graduation from high school, she started working at the Chemical Bank branch in question in August, 1972. She first met the defendant in November, 1972, and they dated regularly after that. She knew him only under the name of "Alex Thompson". (Tr. 23-25).

Over objection, the government was permitted to elicit from Miss Carter testimony that in early January, 1973, she had embezzled an $800.00 money order from the Bank at the defendant's request. She utilized a record keeping maneuver in order to avoid detection. (Tr. 26; GX 13). The trial court found this testimony to be evidence of a prior act bearing upon the relationship between the defendant and Miss Carter (Tr. 26-29).

Miss Carter alleges that, commencing in late July or early August, 1973, she went to live with the defendant for several days at his apartment in Brooklyn. She further claimed that on August 6, 1973, he suggested that she take $30-$40,000.00 of the Bank's funds, place the money in her pocketbook, and meet him over her lunch hour so that they could abscond together. She agreed to do so. On the following day, by pre-arrangement, the defendant allegedly called her at 10:30 A.M., she confirmed that

the money was in her possession, and she met him on a street corner near the Bank at 11:00 A.M. (Tr. 32-38).

They then entered a taxi which the defendant had waiting, and went to a bar where she changed her clothes, put on a wig, and transferred the money from her pocketbook to an attache case that the defendant provided. (Tr. 39-40). Thereafter, the defendant arranged for the gypsy cab to drive them to Philadelphia, where they stayed in a motel overnight (Tr. 40-44). On the following day, after the defendant had wiped the motel room clean of fingerprints, they took a train to St. Louis, where they stayed for several days. (Tr. 44-49). During that period, the defendant went to a hairdresser to get his hair straightened (Tr. 49). They then went to Oakland, California by plane, and within a few days they rented an apartment under the names Sharon and Louis Davis. (Tr. 49-54; GX 3).

Over objection, the government was permitted to elicit from Miss Carter the claim that in September, 1973, over her disagreement, the defendant purchased a used Cadillac Eldorado. (Tr. 54-56).* Over a similar objection, she was permitted to testify that, despite her disagreement, there came a time when they were in Oakland that the defendant

---

*The testimony of the used car dealer is summarized supra, at p. 4.

three hundred vending machines at a cost of $9,000.00 (Tr. 59-60).*

In or about May, 1974, Miss Carter and the defendant separated (See: Tr. 62). In August, 1974, she decided that she would turn herself in (Tr. 62), and she was subsequently arrested by the F.B.I., indicted on the charges in this case, pled guilty, and received a term of three years probation (Tr. 62-3).

It was while they were in Oakland, that Miss Carter learned for the first time that the defendant's true name is Alex Alphonso Powe, Jr. (Tr. 64). As indicated earlier in this Statement of Facts, the defendant had otherwise been using assumed names.

On cross-examination, she claimed that the defendant had pressed her to take the funds, and that it was the defendant's idea to leave New York (Tr. 68, 73). She also claimed that throughout the trip from New York to California, and during their stay in California, the defendant took and retained possession of the funds (Tr. 40-44, 58, 80).

In a pre-trial statement to an F.B.I. agent,

---

*The testimony of the vending machine dealer is summarized supra, at p. 4.

she claimed that she had taken the money from the Bank because she was afraid of the defendant (Tr. 67), and she made a similar claim at the time of her plea of guilty (Tr. 87-88). At the time of her plea, the prosecutor advised the Court that "she [Miss Carter] has testified in the grand jury in a case which has resulted in an indictment and we have found her cooperation at that stage to be very good." Particularly in view of the sentence of probation which was imposed upon Miss Carter, her course of dealings with the government clearly demonstrated that her testimony against the defendant was advantageous to her.

C. The defendant's testimony.

The defendant testified that he met Miss Carter in 1972, and thereafter went out with her occasionally. She once mentioned to him that a friend of hers had asked her to embezzle money from the Bank, and that another friend had asked that she cash a $20,000.00 check at the Bank (Tr. 119-120, 136). Except for the night before the embezzlement, the defendant and Miss Carter never had any conversation about a plan for her to take money from the Bank (Tr. 119-120).

At a time prior to the day of the embezzlement, she asked the defendant to cash a money order for her, and he did so by entering the name of a payee ("Robert Fisher"), and then depositing the money order in his own checking

account. She had explained to him that she was not permitted to cash money orders at her own bank, due to bank policy, and that he would have to put someone else's name on the face of the money order since it would be inappropriate for her name to appear on it (Tr. 136-140; GX 13).

As of the evening of August 6, 1973, the defendant had never lived with Miss Carter. On that night, she came to his house very upset, claiming she was having problems with her mother. She also remarked that she was going to take money out of the Bank on the following day and intended to leave New York. The defendant made no response to the latter comment, apparently thinking it was an idle statement. He was unwilling to engage in conversation with her on that night since he was not feeling well and did not wish to hear her problems. Instead, he told her that, on the following day, he would take her to lunch (Tr. 120-121, 147-1[illegible]).

On August 7, 1973, at about 11:00 A.M. - which was her lunch hour - the defendant arrived in Manhattan, called Miss Carter, and arranged to meet her near the Bank (Tr. 151). When they met, she said "I got it", and he did not know what she was talking about. He only thought they were going to lunch (Tr. 122, 152). From that point on, all of their activities were directed by Miss Carter. She held the cab, and they went to a bar, where she put on a wig. At that point, she said she had taken money from the Bank, although she did not show him any money. She insisted

on leaving New York, and he accompanied her in a gypsy cab to Philadelphia (Tr. 122-123, 158). It was at the New York bar that the defendant concluded that Miss Carter might actually have taken the money - although he did not know it for a fact (Tr. 153).

When they registered in a Philadelphia motel, she showed him the money for the first time, and his response was "Wow". (Tr. 162). He then believed that she had, in fact, taken the money from the Bank (Tr. 165). His reason for accompanying her out of New York into Philadelphia and then on to St. Louis and Oakland, was: "I really wanted to see how far she was going to go with this thing. I guess I was curious." (Tr. 167).

The defendant admitted purchasing the Cadillac and vending machines in California, but he did so at her request and with money which she provided to him (Tr. 125-126). Throughout the period that they were together, Miss Carter held "tightly" to the money (Tr. 126).

The defendant denied that he had any prior knowledge or participation in the scheme in question, and denied his guilt in all respects (Tr. 127, 131, 152, 173).

Argument

POINT I

THE GOVERNMENT'S EVIDENCE OF AN ALLEGEDLY PRIOR SIMILAR ACT WAS UNFAIRLY PREJUDICIAL TO THE DEFENDANT, PARTICULARLY SINCE IT WAS NOT PROBATIVE OF THE CRIMES CHARGED IN THE INDICTMENT.

The indictment charged a conspiracy which commenced on August 1, 1973, and which had as its objective the August 7, 1973 embezzlement of $31,192.26 from the Chemical Bank. The second count charged the substantive accomplishment of the conspiratorial objective, and the third count charged the transportation of the aforesaid funds in interstate commerce.

As shown by our statement of facts, the government's proof that the defendant knowingly and willfully engaged in such criminal conduct, was predicated upon the testimony of the actual embezzler, Miss Carter. The jury's resolution of the factual issues with respect to knowledge and consent was, during the government's case, dependent upon the credibility of Miss Carter. At the end of the case, it was dependent upon the jury's choice as to whether to believe Miss Carter or the defendant.

At the outset of Miss Carter's testimony, the prosecutor directed her attention to certain activities which pre-dated the alleged conspiracy by eight months, to wit: her alleged theft of an $800.00 money order from the Chemical Bank in January, 1973. (Tr. 26-29).

Prior to calling Miss Carter as a witness, the government requested a ruling from the Court as to whether such testimony would be admissible on a prior similar act theory. (Tr. 3). The Court's ruling that the testimony was admissible was accompanied by explanations which hardly supported its admissibility. Thus, the Court conceded:

> "I don't know that it is a prior similar act. It doesn't seem to be similar, but it involves an offense committed by -- if the evidence is believed, Patricia Carter and this defendant, and it's fairly close in point of time as I remember it, and I think it's clearly admissible.
>
> "I think I've got to tell the jury, or should tell the jury, that it's not be[ing] admitted to show any general bad or criminal character of the defendant, but only to show for the consideration of the jury his relationship with Carter and his intent or motive as to the offenses charged in the indictment."
>
> * * *
>
> "All so-called similar offenses, Mr. Schwinger [defense counsel] have some degree of prejudice, but, as you know, I 'm really required to admit it under most circumstances, and I have just been through this in the case I finished yesterday." (Tr. 3-4).

Thus, while acknowledging that the proposed testimony did not constitute evidence of a prior similar act, the Court nevertheless admitted it for the purpose of showing the defendant's intent or motive, and the Court appears to have been under the impression that, "I'm really required to admit it".

Defense counsel pointedly and cogently objected to the Court's ruling:

> "[Defense counsel]: I strongly object to the introduction of that prior similar act. I feel it would prejudice the jury. There was never a criminal proceeding based upon that. It's just an allegation which is made by this witness. It's highly prejudicial.
>
> * * *
>
> "Powe may have been completely innocent in the money order situation. She may have just brought him the money order.
>
> * * *
>
> "It's dangerous. Which are they trying, the bank embezzlement or the postal money order situation?" (Tr. 4-5).

Thus, over objection, Miss Carter was permitted to testify that in early January, 1973, the defendant prompted her to steal an $800.00 money order from the Bank, and she did so. The money order itself was received in evidence as Government Exhibit 13 (Tr. 26-28). The Court gave a cautionary instruction to the jury as to the limited purpose of the evidence in question (Tr. 29).

Defense counsel again noted his objection toward the end of Miss Carter's testimony (Tr. 82).

On cross-examination of the defendant, the government again focused on the money order, and he gave an innocent explanation of how he came to deposit it in his checking account at Miss Carter's request (Tr. 136-140).

There was no other evidence offered at trial concerning the money order. In short, it can be seen that:

1. The government's proof that the money order was stolen was dependent upon the testimony of Miss Carter;

2. The government's proof that the defendant was criminally involved in the money order transaction was also dependent upon the testimony of Miss Carter;

3. The conduct in question was not truly a "prior similar act".

We respectfully submit that since the money order transaction was not a "prior similar act", it was not admissible in evidence. We submit, further, that since the material aspects of the government's proof concerning the money order came solely from Miss Carter that proof had no probative value, and could only have had the function of serving an unfairly prejudicial value.

The issue in this case was one of credibility. If Miss Carter was believed with respect to the charges of the indictment, then the defendant was guilty. Her testimony was clear that the August 7, 1973 embezzlement was committed pursuant to a plan devised by the defendant. There could be no truly probative worth to evidence of a prior criminal act by the defendant, when that evidence is dependant for its significance upon her testimony.

The point was succinctly made in a recent opinion of the New York Appellate Division, Second Department, People v. Lewis, 52 App. Div. 2d 929, 930 (2d Dept., 1976):

> "***Where the evidence of uncharged crimes is not necessary to prove an unambiguous crime, or to explain intent, motive, and the like (See: People v. Molineux, 168 N.Y. 264), it is error to admit evidence of the uncharged crimes (See: People v. Fiore, 34 N.Y. 2d 81; People v. LaFontaine, 39 A.D. 2d 734). At bar, the credibility of the defendant was posed against that of the police officers. In such circumstances, the non-probative evidence admitted could not but disadvantage the defendant."

As this Court stated in United States v. Papadakis, 510 F. 2d 287, 295 (2d Cir., 1975): "There is no more convincing proof to a jury than that of a pattern of conduct which unfolds before their eyes." There can be no doubt that the prosecution offered the money order testimony for the precise purpose of creating the appearance of such a pattern. Under the circumstances, it was grossly unfair.

Moreover, even if the prior act evidence were probative in this case, there was nevertheless a balancing test which the Court should have applied in determining whether its prejudicial affect outweighed its possible probative value. See: McCormick, Evidence, § 190, at 447-454 (1972); United States v. Bozza, 365 F. 2d 206, 213 (2d Cir., 1966); United States v. Deaton, 381 F. 2d 114, 117 (2d Cir., 1967); United States v. Papadakis, 510 F. 2d 287, 294 (2d Cir., 1975). The trial judge's own words, "I'm really required to admit it under most circumstances" (supra, p.12), demonstrate that he did not view the matter as being one of discretion in which a balancing test must be applied.

In view of its lack of probative value, it was reversible error for the Court to admit the money order evidence; in any event, the Court's failure to weigh its prejudicial impact, must lead to the same conclusion.

POINT II

THE COURT'S CHARGE WAS INADEQUATE IN THAT IT FAILED TO INSTRUCT THE JURY THAT THE MERE FACT THAT THE DEFENDANT HELPED SPEND THE EMBEZZLED MONEY WAS INSUFFICIENT TO ESTABLISH HIS GUILT OF THE CRIMES CHARGED.

It is clear that if the jury believed Miss Carter with respect to her claim that the defendant helped to plan the embezzlement, the defendant could properly be convicted of the crimes charged. However, the conspiratorial period alleged in the indictment as well as proof of events long post-dating the termination of the crimes in question, added a complexity to the case which could well have prompted the jury to convict the defendant upon evidence other than the testimony of Miss Carter.

The first count, which charged conspiracy to embezzle, alleged that the conspiratorial period commenced on August 1, 1973 and terminated on February 6, 1975. Upon the facts of this case, that allegation is legally absurd. Miss Carter testified that the plan to embezzle originated on August 6, 1973 (Tr. 31), and it is certain beyond doubt that the embezzlement was completed by noon of the following day. Thus, the crimes charged in Counts I and II were fully

completed by August 7, 1973 before Miss Carter met the defendant on the streetcorner that day. The crime charged in Count III was completed no later than the point at which Miss Carter and the defendant arrived in California and leased an apartment there. Indeed, the count itself charges that the crime was committed on August 7, 1973 and specifies only the transportation from New York to Philadelphia.

Since so much of the evidence, over defense objection, was devoted to the defendant utilizing a portion of the funds to purchase an automobile and to purchase vending machines, the jury, if not properly guided, could have used that conduct as the basis for conviction - independent of Miss Carter's testimony. This was particularly so since the defendant admitted that there came a time when he realized that she had actually embezzled the money (Tr. 123-125, 165).

United States v. Ferraro, 414 F. 2d 802 (5th Cir., 1969), is on all fours with the present case absent Miss Carter's testimony that the defendant helped plan the embezzlement. We submit that, in assessing the adequacy of the charge, the evidence must be viewed from the point of view of the Ferraro fact pattern since we have no way of knowing whether the jury believed Miss Carter's testimony concerning the defendant's involvement in the planning. The Fifth Circuit set forth the Ferraro facts as follows:

> "The appellant and Lois Gilbert lived together, although they were not married. Miss Gilbert was a teller at the Savings and Loan Association. On May 12, 1967, the appellant

picked her up after work. The appellant had very little income and Miss Gilbert had been providing substantially all of the money needed to support the couple. He drove her car, and it was common for him to pick her up at the Association after she completed work.

"On this day, Miss Gilbert carried a bag containing $19,000.00 in cash. She got into the car and they drove away. Shortly thereafter she told the appellant that she had taken the money from the Bank and showed him the money. He immediately drove to their apartment, which was close to the Savings and Loan Association. The appellant admitted he realized a crime had been committed after they got to the apartment. No attempt was thereafter made to return the money or undo what Miss Gilbert had done. They fled the city. The appellant clearly made the decisions as to where the couple would go and on what the money would be spent.

"The government attempted to prove that the appellant and Miss Gilbert had previously planned the crime. In addition to the fact of living together and appellant's unemployed status, the proof was an admission by Miss Gilbert that the appellant, in a joking manner, had made remarks about 'bringing samples home,' etc. She stated that almost everyone else she knew had made similar remarks at one time or another. Miss Gilbert and the appellant both testified that there was no prior scheme. Miss Gilbert said she acted on her own on impulse."

In Ferraro, Ferraro and the teller were charged with the embezzlement pursuant to 18 U.S.C. §§ 2 & 657. That statute is analogous to 18 U.S.C. § 656, but applies to lending, credit and insurance institutions rather than banks. There is no distinction between the standards of liability.

In reversing Ferraro's conviction, the Court held:

"Whether she 'embezzled','abstracted'

> or 'purloined' the money, whichever it was or whatever combination it was, her offense was complete when she walked out of the bank with the money in her possession and met the appellant on the parking lot. If she had been arrested at that moment a claim on her behalf that the crime was not complete clearly would not stand. The offense was complete in every detail. The appellant was no where present, actually or constructively, was doing nothing to aid her, and did not know that she even contemplated taking the money during any of this time. In other words, the theft was an accomplished fact when he learned of it. He did nothing to aid and abet its commission. As urged by the appellant below and here, he might have been charged as an accessory after the fact because of his joining in the flight and in the use and concealment of the stolen money."
>
> "Under holdings of this Circuit...he could have been charged as a receiver of the stolen money under Title 18, U.S.C.A. § 2113(b) and (c).
>
> "But he was not so charged. The government should be required to prove the offense charged, not some other offense. This it clearly failed to do. The judgment of conviction therefore cannot stand."

See also: Validity, Construction, and Application of 18 U.S.C.S. § 2113(c), Making it an Offense to Receive, Possess, Conceal, Store, Barter, Sell, or Dispose of Property or Money Known to Have Been Stolen from Federally Insured Bank, 12 A.L.R. Fed. 664.

No where in its charge did the Court focus upon the proposition that the defendant's participation in the spending of the money in California would not, in and of itself, constitute sufficient evidence to convict him of any of the crimes charged. To the contrary, the Court's charge let stand

the two and one-half year conspiratorial period alleged by the indictment (A. 20), and told the jury that "It is sufficient that you find that a conspiracy was formed and existed for some time within that period." (A. 21).

Similarly, the Court permitted the jury to draw an inference which the Court in United States v. Ferraro, supra, declared to be impermissible:

> "Evidence was admitted which, if believed, would indicate that the defendant Powe was, shortly after money had been stolen from the Chemical Bank, in possession of that money.
>
> "If you find that the defendant Powe was thus in possession of the money, this would justify but would not compel an inference that he knew that the money was stolen unless all the evidence from whatever source his possession is accounted for in some way consistent with innocence.
>
> "If you find that the defendant Powe was in possession in Pennsylvania, California or elsewhere of money recently stolen in New York, this would justify but would not compel an inference that the defendant Powe was a party to the transportation in interstate commerce of the money either as a principal or as an aider and abettor." (A. 25a-26).

The failure of the Court to instruct the jury that the first two counts of the indictment charged crimes which were completed upon the accomplishment of the embezzlement, and that the third count of the indictment charged a crime which necessitated dominion and control over the embezzled funds during the transportation, were each clear error.

In United States v. Infante, 474 F. 2d 522

(2d Cir., 1973), the two defendants were charged with transporting stolen stock certificates in foreign commerce. While the defendant Kurtz appears to have been with the defendant Infante throughout the transportation and during dealings for the sale of the securities, this Court reversed Kurtz's conviction upon the ground that there was insufficient evidence of possession as to him:

> "***But there is a total lack of evidence that Kurtz had actual possession of the stolen stock certificates at any time, and thus the inference of knowledge that the securities were stolen raised by possession applicable to Infante is not applicable to him. Nor can the inference be raised by arguing, as the government seeks to argue, that Kurtz was in constructive possession of the stolen securities. There was no evidence that Kurtz could set the price for the securities, that he had the final say as to their means of transfer or that he was able to assure their delivery. Proof of at least one of these indicia of dominion and control is necessary before a finding of constructive possession can be made.*** Kurtz's presence in the room with the stolen securities is not sufficient to establish his actual or constructive possession of them." [Emphasis added]

See also: United States v. Varelli, 407 F. 2d 735, 748-9 (7th Cir., 1969); United States v. Barlow, 470 F. 2d 1245, 1249-1250 (D.C.Cir., 1972); Hendrix v. United States, 327 F. 2d 971, 972-974 (5th Cir., 1964); United States v. Williams, 503 F. 2d 50, 54 (6th Cir., 1974).

At the conclusion of the Court's charge, counsel for the defendant took the following exceptions:

> "[Defense counsel]: I have an exception. I feel that the crime was complete when the

couple arrived in California and actions by the defendant when in California should not be considered by the jury. That is an element of the transporting of stolen money in interstate commerce. He arrived in California and it was finished and the fact that he used the money thereafter is not an element of that particular offense. It may be some other offense, but not the offense charged. He is not charged with criminally using stolen funds, or something like that.

"THE COURT: I considered that objection and I was pursuaded, rightly or wrongly, that it could be admitted as relevant against the defendant Powe to show intent, motive and relationship and so forth as to prior acts. I may be wrong, but anyway I crossed that bridge so I can't change my charge on that.

"[Defense counsel]: I see.

"THE COURT: Anything else?

"[Defense counsel]: Could your Honor stress a little more the fact that mere presence or acquiescence or knowledge does not --

"THE COURT: I think I gave my standard form charge on that.

"[Defense counsel]: Yes, you did. I heard it I just hope it helped." (A. 35-36).

It is respectfully submitted that the inadequacy of the Court's charge was sufficiently exposed by defense counsel's objection and that, in any event, the charge was plain error.

Conclusion

For all of the above reasons, the judgment of conviction should be reversed.

Respectfully submitted,

HENRY J. BOITEL
Attorney for Appellant
Alphonso C. Powe, Jr.

New York, New York
November 19, 1976

APPENDIX

INDEX TO APPENDIX

PAGINATION AS IN ORIGINAL COPY

DOCKET ENTRIES

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT JUDGE Wyatt 75 CRIM. 41 C.

D. C. Form No. 100 Rev.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U.S.:
vs.	Fedrico E. Virella, AUSA.
ALPHONSO C. POWE, JR., a/k/a Lewis Davis, a/k/a Alex Thompson, a/k/a Alex Green, a/k/a Alpo	791-1934
	For Defendant:

(02) STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed	Clerk					
J.S. 3 mailed 1/	Marshal					
Violation	Docket fee					
Title 18						
Sec. 371,656 & 2314						
Consp. to embez. funds of ins. bank.(Ct.1)						
Bank embez.(Ct.2)						
Interstate transp. of stolen monies.(Ct.3)						
(Three Counts)						

DATE	PROCEEDINGS
4-23-75	Filed indictment.(Related to 75Cr103 and referred to Lasker,J.)
4-29-75	Deft present (Atty Howard Myles Schweiger present) Deft enters a plea of NOT GUILTY.(Referred to Judge Lasker as a related Case). 10 days for motions. Bail fixed at $10,000. Cash or Surety. Continued remanded in lieu of Bail--PIERCE,J.
4-30-75	Filed pltff's Notice of Readiness for Trial on or after 5-15-75.
5-15 -75	Deft. (No atty. present) Court directs entry of not guilty plea. Motions returnable in 10 days. Bail fixed in the amount of $10.000. cash or surety continued. Case re-assigned to Judge Wyatt for all purposes. Wyatt,J.
6-6-75	Filed Govt's. request for the voir dire.
6-6-75	Filed Govt's. requests to charge.
6-10-75	Trial begun, with a jury

A 2

(continued on next pg.)

DATE	PROCEEDINGS
6-11-75	Trial cont'd & concluded . Summation & charge. Jury finds the def't guilty on each of cts 1,2 & 3 . Sentence Aug.22,1975 . Pre sent. invest. ordered. Deft. Remanded no bail. ..... Wyatt, J.
6-23-75	Filed deft's. trial brief, requests to charge & requests for jury selection.
6-23-75	Filed Govt's. requests to charge.
6-23-75	Filed Govt's. memorandum of law regarding prior act similar to act charged.
6-23-75	Filed Govt's. memorandum of law regarding possession of stolen money.
9-3-75	Filed transcript of record of proceedings dated 6-10-75.
9-3-75	Filed transcript of record of proceedings dated 6-11-75 (Powe-cross).
9-3-75	Filed transcript of record of proceedings dated 6-11-75 (Charge of the Court).
9-5-75	Filed JUDGMENT & COMMITMENT (atty present) The deft. is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS, on each of counts 1 and 2, to run concurrently with each other. Imposition of sentence on count 3, is suspended, and deft. is placed on probation for a period of THREE (3) YEARS, subject to the standing probation order of this Court. Special condition of probation being that deft. make restitution, at such time and in such amounts as the probation office may determine.....Wyatt,J. Issued copies 9-9-75.
9-19-75	Filed commitment & entered return. Deft. delivered to Warden, Federal Detention Headquarters, N.Y.C. on 9-5-75.
10-24-75	Filed CJA Form 20 Copy 5 appointing Howard Schwinger as attorney for deft., dated 2-14-75.....Magistrate Jacobs.
10-24-75	Filed CJA Form 20 Copy 2 approving payment to Howard Schwinger, dated 10-15-75. .....Wyatt,J.
10-29-75	Filed Magistrate's final commitment (Mag. #75-1075).....Mag. Jacobs.
2-03-76	Filed ORDER - Deft's. application for appointment of counsel is being forwarded to the Court of Appeals for attention. The application for for reduction of sentence is denied.....Wyatt,J. (notice mailed by Pro Se Clerk)
5-3-76	Filed Dfts. Affdvt. for Forma Pauperis
6-06-76	Filed notice of appeal from judgment of 9-5-75 filed nunc pro tunc. mailed copies.

A TRUE COPY
RUBY J. BURG
CLERK
By A. E. Thompson
Deputy Clerk

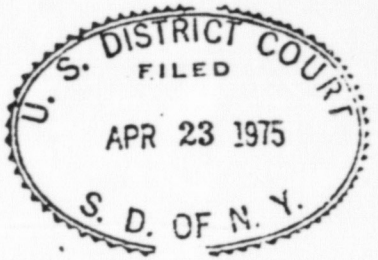
INDICTMENT

VEV,Jr.:js

JUDGE WYATT

JUDGE [redacted]

75 CRIM. 413



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA :

-v- :

ALPHONSO C. POWE, JR., a/k/a "Lewis Davis", a/k/a "Alex Thompson", a/k/a "Alex Greene", a/k/a "Alpo", :

Defendant. :

- x

INDICTMENT

75 Cr.

The Grand Jury charges:

1. From on or about the 1st day of August 1973, up to and including February 6, 1975, in the Southern District of New York and elsewhere, ALPHONSO C. POWE, JR., a/k/a "Lewis Davis", a/k/a "Alex Thompson", a/k/a "Alex Greene", a/k/a "Alpo", the defendant, and Patricia Carter, named herein as co-conspirator but not as a defendant, unlawfully, wilfully, and knowingly did combine, conspire, confederate and agree together and with each other to commit offenses against the United States, to wit, to violate Sections 2 and 656 of Title 18, United States Code.

2. It was a part of said conspiracy that the co-conspirator Patricia Carter, who was then an employee of the Chemical Bank, 425 Park Avenue, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation, unlawfully, wilfully, and knowingly would embezzle, abstract and purloin and cause to be embezzled, abstracted and purloined, moneys, funds, assets and securities intrusted to the custody and care of said bank, to wit, approximately $31,192.26 in cash.

3. It was further a part of said conspiracy that the defendant ALPHONSO C. POWE, JR., a/k/a "Lewis Davis", a/k/a

MICROFILM
APR 29 1975

"Alex Thompson", a/k/a "Alex Greene", a/k/a "Alpo", would and did cause, aid, abet, counsel, command, induce and procure the co-conspirator Patricia Carter to commit the offense described in paragraph 2 of this indictment.

OVERT ACTS

In furtherance of said conspiracy, and to effect the objects thereof, the defendant and co-conspirator did commit the following overt acts, among others, in the Southern District of New York and elsewhere:

1. On or about August 6, 1973, the defendant, ALPHONSO C. POWE, JR., a/k/a "Lewis Davis", a/k/a "Alex Thompson", a/k/a "Alex Greene", a/k/a "Alpo", and the co-conspirator Patricia Carter met and had a conversation in the vicinity of Sterling Place in Brooklyn, New York.

2. On or about August 7, 1973, the co-conspirator Patricia Carter, took a hand-bag to work to the Chemical Bank, 425 Park Avenue, New York, New York.

3. On or about August 7, 1973, the defendant, ALPHONSO C. POWE, JR., a/k/a "Lewis Davis", a/k/a "Alex Thompson", a/k/a "Alex Greene", a/k/a "Alpo", and co-conspirator Patricia Carter

had a telephone conversation.

4. On or about August 7, 1973, the co-conspirator Patricia Carter, at the Chemical Bank, 425 Park Avenue, New York, New York, put approximately $31,192.26 in a handbag which she removed from said bank.

5. On or about August 7, 1973, the defendant, ALPHONSO C. POWE, JR., a/ka "Lewis Davis", a/k/a "Alex Thompson", a/k/a "Alex Greene", a/k/a "Alpo", and the co-conspirator Patricia Carter took and rode a taxi-cab from the vicinity of 54th Street and Lexington Avenue in New York, New York to the vicinity of East 116th Street and Park Avenue in New York, New York.

(Title 18, United States Code, Section 371.)

TEW,Jr.:js

COUNT TWO

The Grand Jury further charges:

On or about the 7th day of August 1973, in the Southern District of New York, ALPHONSO C. POWE, JR., a/k/a "Lewis Davis", a/k/a "Alex Thompson", a/k/a "Alex Greene", a/k/a "Alpo", the defendant, unlawfully, wilfully and knowingly, did aid, abet, counsel, command, induce, procure and cause Patricia Carter, who was then an employee of the Chemical Bank, 425 Park Avenue to unlawfully, wilfully and knowingly embezzle, abstract and purloin moneys, funds, assets and securities, to wit, approximately $31,192.26 in cash, which was intrusted to the custody and care of said bank. At all material times, the Chemical Bank, 425 Park Avenue, New York, New York was insured by the Federal Deposit Insurance Corporation.

(Title 18, United States Code, Sections 656 and 2.)

COUNT THREE

The Grand Jury further charges:

On or about the 7th day of August 1973, in the Southern District of New York and elsewhere, ALPHONSO C. POWE, JR., a/k/a "Lewis Davis", a/k/a "Alex Thompson", a/k/a "Alex Greene", a/k/a "Alpo", the defendant, unlawfully, wilfully, and knowingly, did transport and cause to be transported in interstate commerce, to wit, from New York, New York, to Philadelphia, Pennsylvania and elsewhere, money in the approximate amount of $31,192.26, knowing the same to have been stolen, converted and taken by fraud.

(Title 18, United States Code, Section 2314 and 2.)

Irving J. Gard
FOREMAN

Paul J. Curran
PAUL J. CURRAN
United States Attorney

(Reporter) Joseph Quinones – Howard M. Schwingel Esq – Federico E. Vi

SEP 8 1975 Deft. (atty present) sentenced to THREE (3) YEARS, on each of counts
of to run concurrently with each other. Imposition of sentence on count 3,
is suspended and deft. is placed on probation for period of THREE (3) Y
Special condition of probation being that deft. make restitution at such
time and in such amounts as the probation office may determine.

Wyatt.

Form No. USA-33s-274 (Ed. 9-25-58)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

ALPHONSO C. POWE, JR., a/k/a "Lewis Davis", a/k/a "Alex Thompson", a/k/a "Alex Greene", a/k/a "Alpo",

Defendant.

INDICTMENT

(18 USC §§ 371, 2, 656 and 2314.)

PAUL J. CURRAN

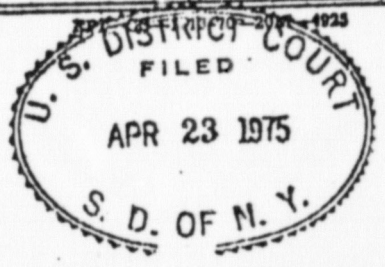
United States Attorney.

A TRUE BILL

Irving J. Bard

Foreman.

APR 24 1975 - 20M - 1925



JUDGE [redacted]

~~Deft. [illegible] Bail~~

4-29-75 Deft. present; Atty Howard Hoyle present; Scheuerer present; Deft enters a plea of N/G. (Reference to Judge Parker and a related case) 10 days for motions. Bail fixed at $10,000. Case continued remanded in lieu of bail.

Parker, J. WM

15

5-14-75 Deft. present (atty not present) Court enters plea of not guilty. Case re-assigned to Wyatt, J. 10 days for motions. Bail $10,000 Cash or surety ent

Wyatt, J.

5/15/75 Pre-Trial confer. held. Trial June 9, 1975 9:30 A.M.

Wyatt, J.

JUN-1[illegible]1975 atty present - Trial begun, with a jury. 1 excluded.

JUN 11 1975 Trial cont'd. Summations & Charge. Jury finds the deft. guilty on each of cts 1, 2 & 3. Sentenced Aug. 22, 1975 Pre-Sent. Invest. Ordered. Deft. remanded no bail.

Wyatt, J.

COURT'S CHARGE

USA v Powe
6/11/75
75 Cr. 413

mcbr 1

CHARGE OF THE COURT

(Wyatt, J.)

THE COURT: Mr. Foreman, ladies and gentlemen of the jury:

This has been a short trial but, regretfully, my instructions cannot be short. It is important to the government and it is important to the defendant that I cover the points of law accurately and completely, and that is going to take a little while.

The case is now about to be submitted to you for your decision on the issues of fact and your decision as to those fact issues determines whether your verdict as to the defendant is guilty or not guilty. In making your decisions you act as ministers of justice and you discharge an obligation of citizenship which it is not too much to call sacred.

In making your decisions you should adopt an attitude of complete fairness and impartiality. I should add that the fact that the government is a party and that the prosecution is brought in the name of the United States does not entitle the government or its witnesses to any greater consideration than that accorded any other party, in this instance the defendant. All parties, the government and individuals alike, stand as equals here before the bar of

mcbr 2

justice.

You are the sole and exclusive judges of the facts. You draw whatever inferences you find are justified from the facts as you may find those facts to be. My function is to give you instructions as to the applicable law and your duty is to apply those instructions to the facts as you may find them.

You must rely in determining the issues of fact on your own recollection of the evidence, which is what controls. What counsel have said to you this morning or yesterday, what I mayhave said or may say now as to any fact is not evidence and should not be taken in place of your own recollection, which is what controls.

Now, you are not to assume, ladies and gentlemen, that I have any opinion as to the guilt or innocence of this defendant, or as to the truth or falsity of any of the charges. In this connection you heard me occasionally ask questions. Those questions were intended to make something clearer for your benefit and never were such questions by me intended to indicate any opinion of mine.

Similarly, the fact that the Court may have been called upon to make rulings during the course of the trial should be disregarded by the jury. The rulings made by the Court relate to matters oflaw which, as you know,

are not the concern of the jury.

Now, members of the jury, also in this connection, you should disregard what is said between the Court and the counsel and in this connection you should bear in mind that Judges are indeed human and sometimes they get impatient. I may have been or have been impatient with counsel and you should draw no inference of any sort at any side to which my impatience may for the moment have seemed to be directed.

The indictment, I must remind the jury again, is an accusation. It is a charge. The defendant has pleaded not guilty and you should give no weight to the fact that an indictment has been returned against him. The government has the burden of proving the charges against the defendant beyond a reasonable doubt. That burden never shifts. A defendant does not have to prove his innocence. On the contrary, he is presumed to be innocent of the charges contained in the indictment and that presumption continues until you, the jury, find, if you do find, that the government has proved the guilt of the defendant beyond a reasonable doubt.

What do we mean by this expression; a reasonable doubt? We normally say that it is a doubt founded on reason and arising from the evidence or the lack of evi-

dence. It is a doubt which a reasonable person has after carefully weighing the evidence. It is a doubt which is substantial and not shadowy. A reasonable doubt is one which appeals to your reason, your judgment, your experience, your common sense. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant. A reasonable doubt is not a vague, speculative, imaginary doubt, but such a doubt as would cause prudent persons to hesitate before acting in matters of importance to themselves. Proof beyond a reasonable doubt, members of the jury, does not mean proof to a positive certainty or beyond all possible doubt. If that were the rule few men or women, however guilty, would ever be convicted. It is practically impossible for a person to be absolutely and completely convinced of any controverted fact which is not by its nature capable of proof to a mathematical certainty.

In consequence, the law in a criminal case is that guilt must be proved beyond a reasonable doubt and not beyond all possible doubt.

Now, there are three counts in the indictment. They charge three separate offenses. The word count simply means a section of the indictment charging a separate offense, one offense, and it is required in our

mcbr 5

procedure that each separate offense be charged in a separate count or section of the indictment.

The first count charges a conspiracy, that is, an agreement or criminal partnership, between the defendant and Patricia Carter. The conspiracy charged is one to violate a federal law making it an offense to embezzle, abstract or purloin moneys from a bank. A conspiracy, which is sometimes called a partnership in crime because it involves collective or organized activity presents a greater potential threat to the public interest than the illicit activity of a single wrongdoer.

Group association or organized activity renders detection more difficult, for example. For this and other reasons Congress has enacted a special law that provides that any person who conspires to violate a federal law is guilty of a separate offense.

The second count of the indictment charges that the defendant committed an actual violation of the law which he is charged in the first count with conspiring to violate. The second count is what is called in law, but you should know it, a substantive offense. A substantive offense is different from a conspiracy.

Now, the third count is a substantive count and the third count charges the defendant with violating a

federal law making it an offense to transport money in interstate commerce knowing that the money had been stolen.

Now, Mr. Foreman, members of the jury, I think it will be easier for you if we take up for discussion the second count first. The second count charges the defendant with violating a federal law which reads in pertinent part as follows:

"Whoever, being an employee of or connected in any capacity with any insured bank embezzles, abstracts or purloins any of the moneys of such bank or any moneys entrusted to the custody and care of such bank shall be guilty of an offense."

Now, the second count charges -- I read it to you yesterday. I won't read it word for word. It charges, in substance, that on August the 7th, 1973 the defendant aided and abetted Patricia Carter to embezzle 31,000 odd dollars from the Chemical Bank.

Now, that is the second count to which the defendant has pleaded not guilty. You will notice that the charge is not that the defendant himself embezzled any moneys from Chemical Bank. The charge is that Miss Carter was an employee of the bank; that she embezzled the moneys and that the defendant Powe aided and abetted her in so doing. And you should keep in mind that expression "aiding and

abetting," which I will explain to you in more detail in a few minutes.

Now, in order to prove this second count the government must establish beyond a reasonable doubt the following essential elements:

First,that Patricia Carter was an employee of the bank on or about August 7, 1973.

Second, that Chemical Bank was an insured bank and an insured bank is defined by law to be any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

Now, these two elements appear to be established without much dispute, but you must find each to be true beyond a reasonable doubt in order to find the defendant guilty of the offense charged in Count 2.

The third essential element is that Miss Carter embezzled, abstracted or purloined moneys from the Chemical Bank.

Fourth, that these moneys belonged to or had been entrusted to the care or custody of the Chemical Bank, and, finally, that Patricia Carter and the defendant acted wilfully and knowingly.

Now, to embezzle money means that a person in whose possession the money lawfully came, as in the case

mcbr 8

of a bank employee, takes and converts the money to his or her own use. To abstract money from a bank is to take or withdraw money from the possession and control of the bank. To purloin is simply to steal, to take by theft.

Now, an acti is done knowingly if it is done voluntarily and purposely and not because of mistake, accident, negligence or some other such innocent reason. An act is wilful if it is done knowingly, deliberately and with evil motive or purpose.

You remember that it is not charged that the defendant Powe was an employee of the Chemical Bank or that he took any moneys from the bank. The charge in this second count is that he aided and abetted Miss Carter to embezzle the moneys and in this connection the government relies on a law which reads in relevant part as follows:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal."

This means that not only is the person who commits an illegal act, the person usually called a principal, guilty but anyone who aids or abets in the commission of the act is likewise guilty of committing that act.

In order to find that a defendant aided or abetted another to commit the offense charged you must

mcbr 9

find that the defendant in some way associated himself with the venture, that is, participated in it as something he wished to bring about; that by his act or actions he endeavored to make it succeed. This participation by a defendant may be shown by any act designed to promote or further the crime, even of relatively slight importance, which you find was committed by the defendant.

But to find a defendant guilty of aiding and abetting you must find something more than mere knowledge that the crime was being committed since a mere spectator at a crime is not a participant.

It is not necessary, however, to find that the defendant himself did any of the acts since, as you just heard, participation in the crime can be found, for example, if you find that he counselled or aided orabetted or assisted another person to commit the crime.

Now, aiding and abetting means, as I said, an association with the venture. When people enter into a joint venture to accomplish an unlawful act they become agents for one another in carrying out the joint venture. Hence, the acts of one in the course of the joint venture and in furtherance of a common purpose are deemed to be the acts of all and all are responsible for such acts.

Now, Mr. Foreman and ladies and gentlemen of the

mcbr 10

jury, we turn to the first count, the conspiracy count, and I will not read this count to you. I read it yesterday and I will give a copy at the end of my instructions to the foreman for your own use during your deliberations.

The defendant has pleaded not guilty to the conspiracy count and that forms the issue to be tried on this count.

Now, to prove the conspiracy charged in the first count the government must prove beyond a reasonable doubt each of the following essential elements. First, the existence of the conspiracy charged in the indictment; that is, that some time between August 1, 1973 and February 6, 1975 in the Southern District of New York a conspiracy to embezzle, abstract or purloin money from the Chemical Bank existed between the defendant here on trial, Mr. Powe, and Miss Carter.

The second essential element is that the defendant, Mr. Powe, knowingly and wilfully associated himself with the conspiracy.

Third, that one of the conspirators, either Mr. Powe or Miss Carter, knowingly committed in the Southern District of New York at least one overt act, a term which will be explained to you in just a few minutes.

It is not required that the government prove that

mcbr 11

the conspiracy started or ended on the dates alleged in the indictment. It is sufficient that you find that a conspiracy was formed and existed for some time within that period.

The offense of conspiracy, members of the jury, is complete when the unlawful agreement is made and any single overt act is thereafter knowingly committed by at least one of the co-conspirators.

What is a conspiracy? A conspiracy is a combination or agreement of two or more persons by concerted action to accomplish a criminal or unlawful purpose. The gist of the crime of conspiracy is the unlawful combination or agreement to violate the law. A conspiracy is sometimes called a partnership in crime in which each conspirator, each member of the conspiracy, becomes the agent and partner of every other member.

To establish a conspiracy the government is not required to show that two or more persons sat around a table and entered into a solemn compact in writing or stating that they formed a conspiracy to violate the law or setting forth the details of the plan, the means by which the unlawful project will be carried out and the part to be played by each participant.

Indeed, it would be most extraordinary if there were

such a formal document or specific oral agreement in the case of a criminal conspiracy. Your common sense will tell you that when men and women in fact undertake to enter into a criminal conspiracy much is left to unexpressed understanding. From its very nature a conspiracy is almost invariably secret in its origins and secret in its execution.

It is sufficient, therefore, if two or more persons in any manner to through any contrivance impliedly or tacitly come to an understanding in common to violate the law. Express language or specific words are not required to indicate assent or attachment to a conspiracy.

If you do conclude that a conspiracy as charged did exist, then you must next determine whether the defendant on trial, Mr. Powe, was a member; that he wilfully associated himself with the conspiracy.

And, of course, when we speak of the words which I have already defined for you, knowingly and wilfully, you will appreciate that they involve intent. Intent involves also the state of a person's mind and while this is a fact, it is a fact which it is impossible to prove by direct evidence short of an express admission by a defendant. This is because you cannot look into a person's mind and see what hisor her intent was. However, like any other fact,

mcbr 13

intent may be proved by circumstantial evidence, and let us stop just a moment to discuss this expression circumstantial evidence.

There are two kinds of evidence, direct evidence and circumstantial evidence. Direct evidence is where a witness testified to what he saw, heard, observed, what he knows of his own knowledge, something which comes to him or to her by virtue of the sense of sight or hearing, for example.

Circumstantial evidence, on the other hand, is evidence of facts and circumstances from which one may infer connected facts which reasonably follow in the common experience of mankind. And the example often used in this courthouse comes from the old story of Robinson Cruso. You will recall in that old story one day Robinson Crusoe saw footprints in the sand on the beach. He did not see a man walking on the beach, but he immediately drew an inference from the fact of the footprints that a man in fact had been walking on the beach, and that is about all there is to circumstantial evidence. You infer on the basis of reason and experience from an established fact the existence of some other fact.

Now, you heard me say earlier that an essential element of the crime of conspiracy is that an overt act

mcbr 14

to effect the object of the conspiracy be committed by at least one of the co-conspirators after the unlawful agreement has been made.

Now, an overt act is any step, action or conduct which is taken to achieve, accomplish or further the object of the conspiracy. The purpose Congress had in mind when it made an overt act an element of the offense is that while persons may conspire and agree to do an unlawful act, yet they may change their minds and do nothing to carry out the agreement, and if they do nothing to carry out the agreement, then it will not constitute an offense, because there has been no overt act.

Now, you have observed that more than one overt act is stated in the indictment, but it is only necessary for the government to prove one overt act, namely, any step, action or conduct to achieve the object of the conspiracy, and, of course, it is not necessary that an overt act itself be a criminal act. It is only necessary that it be an act, however normally innocent, to carry out or further the unlawful agreement.

Now, members of the jury, we turn to the third and last count. The third count charges a violation by the defendant of a federal law which in relevant part provides:

mcbr 15

"Whoever transports in interstate commerce any money of the value of $5,000 or more knowing the same to have been stolen, converted or taken by fraud is guilty of an offense."

The third count also involves a second law which is part of the aiding and abetting statute and which reads in relevant part as follows:

"Whoever wilfully causes an act to be done which if directly performed by him would be an offense against the United States is punishable as a principal."

Now, the third count, which I won't read word for word, in substance charges that on or about August 7, 1973 the defendant transported and caused to be transported in interstate commerce from New York to Philadelphia and elsewhere money in the amount of some $31,000 knowing the same to have been stolen, converted and taken by fraud.

Now that is the third count, to which the defendant pleaded not guilty, which raises the fact issue to be tried.

There are four essential elements of the offense charged in this third count, and they are as follows:

First, that the defendant transported money in interstate commerce or wilfully caused money to be transported in interstate commerce.

Second, that at the time of the transportation

mcbr 16

the money had been stolen, converted or taken by fraud.

Third, that the money had a value of $5,000 or more;

And, fourth, that at the time of the transportation the defendant knew that the money had been stolen, converted or taken by fraud.

Now, members of the jury, I have been using a certain number of legal terms and I will define some of those terms. Stolen, converted or taken by fraud means any taking by which a person dishonestly obtains money which belongs to another with the intent to deprive the rightful owner of such money. Money means legal tender of the United States. Value means the face value of the money. Interstate commerce refers to commerce between one state or the District of Columbia and another state or the District of Columbia.

Evidence was admitted which, if believed, would indicate that the defendant Powe was, shortly after money had been stolen from the Chemical Bank, in possession of that money.

If you find that the defendant Powe was thus in possession of the money, this would justify but would not compel an inference that he knew that the money was stolen unless on all the evidence from whatever source his possession

mcbr 17

is accounted for in some way consistent with innocence.

If you find that the defendant Powe was in possession in Pennsylvania, California or elsewhere of money recently stolen in New York, this would justify but would not compel an inference that the defendant Powe was a party to the transportation in interstate commerce of the money either as a principal or as an aider and abetter.

Now, members of the jury, it may be a good idea if we stopped here for a few minutes break and perhaps we will excuse you. You may retire for a few moments to the jury room and we will resume in just a few minutes.

(Recess.)

THE COURT: Now, Mr. Foreman, ladies and gentlemen of the jury, we turn to the question of the credibility of witnesses. How do you determine whether witnesses are telling the truth? We say and always advise jurors that you use your ordinary common sense which you by no means leave behind when you come here to the courthouse and retire to the jury room. As practical men and women you draw on your everyday experience in meeting and dealing with people in business and social life.

In passing on the credibility of witnesses you may take into account inconsistencies or contradictions or conflicts as to any matter which the witness may have

mcbr 18

testified to at this trial. The degree of credit to be given to a witness depends on his or her demeanor here, the relationship of the witness to the case or to the parties, his or her bias or impartiality, the strength or weakness of his or her recollection.

You observe the witnesses. How did they strike you? Did their answers seem fair and reasonable, frank, candid, open? You take each one of them and you decide on the basis of your own experience whether or not you can believe the witness and to what extent you believe him or her.

You may consider whether a witness has any interest in the matter which might affect the testimony. If the witness has some interest you may consider this in weighing the credibility. An interested witness is not necessarily unworthy of belief. It is only a fact to be considered in determining what weight to give his or her own testimony.

The law permits but does not require a defendant to testify in his own behalf. The defendant Powe has taken the witness stand and has testified. Obviously a defendant has a deep personal interest in the result of his prosecution. In fact, it seems clear that he has the greatest interest of all. Interest creates a motive for false testimony.

mcbr 19

The greater the interest, the stronger the motive, and the interest of a defendant in the result of his trial is of a character possessed by no other witness.

In appraising his credibility you may take the fact of interest into consideration. However, it by no means follows that simply because a person has a vital interest in the result that he is not capable of giving a straightforward and truthful account of events. It is for you to decide to what extent, if any, his interest has affected his credibility.

The government called Miss Patricia Carter as a witness and she admitted her involvement in the offense here charged and her wrongdoing. In the eyes of the law Miss Carter is an accomplice in the same offenses charged against the defendant here on trial.

In the prosecution and detection of a crime, the government of necessity is frequently compelled to rely upon the testimony of accomplices. Often it has no choice in the matter. The government must take its witnesses to the transaction as they are, and an accomplice does not become incompetent to testify because of participation in the criminal acts charged. If accomplices could not be used in many instances it would be diffiuclt, if not impossible, to detect and prosecute wrongdoers, and this

is especially true in conspiracy cases.

Frequently it happens that only those who participated have evidence which is relevant and important if a prosecution is to succeed. There is no requirement in the federal courts that the testimony of an accomplice be corroborated. A conviction may rest on the uncorroborated testimony of an accomplice if you find it to be credible, to be believable.

Of course, in this instance, the government claims that there is corroboration of the testimony of the accomplice. The fact that a witness is an accomplice may be considered by you, the jury, as bearing upon the credibility of that witness. However, it does not follow that because a person has acknowledged participation in a crime or is an accomplice that he or she is not capable of giving a truthful account of what occurred. His or her testimony, of course, should be viewed with great caution and scrutinized carefully.

You will consider whether the testimony of the accomplice witness was a fabrication induced by a belief that she will receive or has already received favorable consideration from the law enforcement officers, or you will consider whether this accomplice witness, Miss Carter, bared herself publicly before you, made a clean breast of

her wrongdoing and told the truth. In short, did she decide to come clean and tell the truth?

If you find that the testimony of the accomplice witness, Miss Carter, was deliberately untruthful, you may reject it. On the other hand, if upon a cautious and careful examination you are satisfied that she has given a truthful version and that the government has sustained its burden of proof in all other respects as I have outlined in these instructions, then you have sufficient proof on which to bring in a verdict of guilty.

Now, members of the jury, the intentional flight of a defendant after the commission of a crime does not itself create a presumption of guilt, but it is a fact which if proved may be considered by the jury in the light of all other evidence in the case in determining guilt or innocense. Evidence of flight was admitted for your consideration and your consideration of the evidence of flight should center about whether it showed consciousness of guilt and, if so, whether this is evidence of guilt of the defendant, Mr. Powe.

In considering the evidence of flight you should also consider that there might be reasons for flight consistent with innocence. It may also be that a feeling of guilt does not necessarily reflect actual guilt.

mcbr 22

These are matters for your consideration when you consider the evidence of flight of the defendant.

Similar to evidence of flight is evidence of use by the defendant of a name other than his own. For example, evidence that the defendant after the alleged commission of the offense used a false name or names to avoid identification. If you believe such evidence you may but need not infer from such evidence a consciousness of guilt on his part.

Now we are coming to the end of these unfortunately lengthy instructions. In conclusion, I say that each one of you is entitled to his or her own opinion. You should, however, exchange views amongst yourselves, each with his fellow jurors. That is the very essence of jury deliberation, to discuss and consider the evidence, to listen to the arguments of fellow jurors, to present your individual views and to reach an agreement based solely and wholly on the evidence, if you can do so without violence to your individual views.

Each one must decide the case for himself or herself, but you should not hesitate to change an opinion which after discussion with your fellow jurors appears to be mistaken in the light of the evidence and of the discussion viewed against the evidence and the law.

mcbr 23

However, if after carefully considering all of the evidence and the arguments of your fellow jurors you maintain a conscientious view which differs from the others, you are not to yield your conviction because you are outnumbered or outweighed.

Your final vote should reflect your conscientious conviction as to how the issues are to be decided.

Ladies and gentlemen, your verdict must be unanimous. That is, on each count the verdict must be unanimous.

The jury is not to consider or in any way to speculate about the punishment which the defendant may receive if he is found guilty. Under your oath as jurors you cannot allow a consideration of the punishment that might be imposed upon a defendant if he is convicted to influence your verdict in any way, or to enter into your deliberations in any sense. The function of the jury is to determine whether the defendant is guilty or not guilty. It is the Judge alone, the Court, who has the responsibility and the duty of determining a sentence if there is a conviction.

The charges here, ladies and gentlemen, are most serious. The just determination of this case is important to the public. It is equally important to this defendant. Under your oath as jurors you must decide

this case without fear or favor and solely, as I have tried to emphasize, in accordance with the evidence and the law.

If the government has failed to carry its burden as to this defendant your sworn duty is to bring in a verdict of not guilty. If the government has carried its burden, you must not flinch from your sworn duty but you must bring in a verdict of guilty. The guilt of the defendant on each count is for you and you alone to determine. The government to prevail must prove the essential elements as I explained them by the required degree of proof. If it succeeds, as I just said, your verdict must be guilty. If it fails, your verdict must be not guilty.

Your verdict will be returned orally by your foreman in open court, and, of course, the verdict on each count will be either simply guilty or not guilty.

Thank you.

Now, Mr. Foreman, I am going to give you a copy of the indictment. This is simply for the convenient use of the jury during its deliberations. As I said before, the indictment is not evidence. The defendant has pleaded not guilty, which amounts to a denial of the charges in the indictment, and, of course, that I ask you to understand.

Now I am also giving to Mr. Foreman a form to

be used simply as a guide for returning your verdict on each count. This form is not to be signed. It is only for your convenient use. Your verdict, as I said, will be returned orally by Mr. Foreman in open court and it goes without saying that this form is not intended to and it should not in any way influence your verdict.

If during your deliberations you wish to see any of the exhibits, Mr. Foreman, you should send a note through the marshal and we will send in the requested exhibit to you. If youwish any testimony read to you, likewise send a note through the marshal. Your request will be considered and if granted arrangements will be made.

Now we come to that part of the trial when we must excuse our two alternate jurors, Mrs. Guttenberg and Mr. Young. I want you to realize that of course this was a shorttrial and the period within which there might have been an emergency was a short one, but in any trial we must have alternate jurors because if an emergency arises and some member of the 12 jurors has to be excused, if we didn't have alternate jurors we would have to simply stop the trial and start all over again with the duplication of expense and the time and effort that that involves, so our alternate jurors are always our insurance against such emergencies.

mcbr 26

Thank you very much, Mrs. Guttenberg and Mr. Young. We will excuse you, so you can take your things, if any, from the jury room and be vacated when the jury retires.

Mr. Clerk, do you have any instructions for the alternate jurors?

THE CLERK: They are excused until Monday morning at 9 o'clock in Room 109.

THE COURT: All right.

(Two alternate jurors were excused.)

THE COURT: Mr. Foreman, ladies and gentlemen of the jury, I would appreciate your remaining patiently and in silenc for just a few minutes more while I see counsel and the reporter at the side bar for any last minute questions of law.

(At the side bar.)

THE COURT: Mr. Virella?

MR. VIRELLA: No objections, your Honor.

THE COURT: Mr. Schwinger?

MR. SCHWINGER: Exceptions to the charge?

THE COURT: Yes.

MR. SCHWINGER: I have an exception. I feel that the crime was complete when the couple arrived in California and actions by the defendant when in California

mcbr 27

should not be considered by the jury. That is an element of the transporting of stolen money in interstate commerce. He arrived in California and it was finished and the fact that he used the money thereafter is not an element of that particular offense. It may be some other offense, but not the offense charged. He is not charged with criminally using stolen funds, or something like that.

THE COURT: I considered that objection and I was persuaded, rightly or wrongly, that it could be admitted as relevant against the defendant Powe to show intent, motive and relationship and so forth as to prior acts. I may be wrong, but anyway I crossed that bridge so I can't change my charge on that.

MR. SCHWINGER: I see.

THE COURT: Anything else?

MR. SCHWINGER: Could your Honor stress a little more the fact that mere presence or acquiescene or knowledge does not --

THE COURT: I think I gave my standard form charge on that.

MR. SCHWINGER: Yes, you did. I heard it. I just hope it helped.

(In open court.)

mcbr 28

THE COURT: Mr. Clerk, will you swear the marshals.

(Marshals sworn.)

THE COURT: Mr. Foreman, members of the jury, the case is now submitted to you for your decision. The marshal will accompany you to the jury room and you may retire.

Marshal, I suggest that at a quarter to one you take the jury to lunch.

DEPUTY MARSHAL: Okay, your Honor.

THE COURT: All right, you may retire.

(The jury left the courtroom at12:32 to begin its deliberations.)

THE COURT: Mr. Clerk, will you mark a copy of the memorandum which I gave the foreman as a Court Exhibit.

(Court's Exhibit 1 marked)

THE COURT: Will you give a copy to counsel on each side.

THE CLERK: Yes, your Honor.

THE COURT: We'll await the pleasure of the jury.

(Recess)

THE COURT: We have a note from the jury. The note says: "We need to rehear the charge on count 2."

Mr. Clerk, will you mark this as the next Court's Exhibit.

(Court's Exhibit 2 marked)

THE COURT: All right, will you get the jury.

(In open court, jury present at 3:05 p.m.)

THE COURT: Now, members of the jury, we have your note which says: "We need to rehear the charge on count 2."

And I think I can certainly repeat my instructions as to count 2 in substance, because while I don't follow notes slavishly, I do feel required to use notes and I keep them.

Maybe I should, in view of the question, read

count 2. Count 2 reads: "The grand jury further charges on or about the 7th day of August 1973, in the Southern District of New York, Alphonso C. Powe, Jr., also known as Lewis Davis" -- and the other aliases -- "the defendant, unlawfully, wilfully and knowingly did aid, abet, counsel, command, induce, procure and cause Patricia Carter, who was then an employee of the Chemical Bank, 425 Park Avenue, New York, New York, to unlawfully, wilfully and knowingly embezzle, abstract and purloin moneys, funds, assets and securities, to wit, approximately $31,129.26 in cash, which was entrusted to the custody and care of said bank, and at all material times the Chemical Bank, 425 Park Avenue, New York, New York, was insured by the Federal Deposit Insurance Corporation."

And I began by reading the relevant parts of the federal statute which controls, and that is: "Whoever being an employee of or connected in any capacity with any insured bank embezzles, abstracts or purloins any of the moneys of such bank or any moneys entrusted to the custody and care of such bank, shall be guilty of an offense."

And I explained that the charge is not that defendant Powe himself embezzled any moneys from Chemical Bank. The charge is that Miss Carter was an employee of the bank; that she embezzled the moneys; and that the

defendant Powe aided and abetted her in so doing.

Then I pointed out that the five essential elements of the offense charged in the second count is, first, that Miss Carter was an employee of the Chemical Bank; second, that the Chemical Bank was an insured bank, that is, insured by the Federal Deposit Insurance Corporation, and I stated to you that these two elements do not appear to be seriously disputed, but that for a conviction, of course, you would have to find that Miss Carter was an employee of the Chemical Bank and that the Chemical Bank was an insured bank.

Then, the third, fourth and fifth essential elements: third, that Miss Carter embezzled moneys from the Chemical Bank; fourth, that the moneys had been entrusted to the custody or care of the Chemical Bank, and we can pass that by because that obviously seems to be the case; and finally, that Miss Carter and the defendant Powe acted wilfully and knowingly.

Then the words "embezzle, abstract and purloin" I defined. To embezzle money means that a person in whose possession the moneys lawfully came, such as a bank employee, would take and convert the money to his or her own use. To abstract means a repetition of the idea of embezzlement in the sense that abstract means to take or withdraw money

from the possession and control of the bank. And to purloin is again a synonym or repetition. It means simply to steal or to take by theft.

Then I defined "knowingly" and "wilfully." An act is done knowingly if it is done voluntarily and purposely and not because of negligence, accident, mistake or some other innocent reason.

Wilfully, of course, means to do an act knowingly and deliberately and with a bad purpose or motive.

Then I referred to the fact that the charge in the second count is that Powe, the defendant, aided and abetted Miss Carter, and I read you the statute. Technically, it's Section 2 of Title 18, generally called the "aiding and abetting statute," and that reads: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

This means that not only is the person who commits an illegal act, the person usually called a principal, guilty, but anyone who aids or abets in the commission of the act is likewise guilty of committing that illegal act.

Then I explained that in order to find that a defendant aided or abetted another to commit the offense

charged, it must be found that the defendant in some way associated himself with the venture, that is, the commission of the illegal act; that he participated in the venture as something that he wished to bring about; that by his acts he endeavored to make the venture succeed, in this case the theft of money from the bank, and I explained that the participation by defendant as an aider or abettor may be shown by any act designed to promote or further the crime, even of relatively slight importance, which you find was committed by the defendant.

Then I said that a defendant to be guilty as an aider or abettor, he must be found to have something more than simply knowledge that a crime was being committed, because a spectator, one who merely looks on, does nothing to help, does nothing to assist, does nothing to counsel, procure, induce, advise, a mere spectator of a crime is not a participant.

Then I pointed out --this follows from the aiding and abetting statute -- that it was not necessary to find, of course, that the defendant did any of the acts constituting the offense; that is, to find that he, himself, embezzled any money, because participation in the crime as an aider and abettor can be found, if it be found, that the defendant counseled or aided or suggested or induced

or procured or abetted or assisted another person to commit the crime.

And then finally I repeated that aiding and abetting means association with the venture; that when people enter into a joint venture to accomplish an unlawful act, they become agents for each other in carrying out the joint venture, and therefore the acts of one in the course of the joint venture, and in furtherance of the common purpose of the joint venture, are deemed to be the acts of all, in this case the acts of both, and both are responsible for such acts.

Now, I have repeated substantially my instructions on the second count and I trust your inquiry has been answered.

Thank you. You may resume your deliberations.

(The jury left the courtroom)

(Recess)

THE COURT: I'm told that the jury has reached a verdict.

Mr. Clerk.

(In open court, jury present at 3:55 p.m.)

(Jury roll taken; all jurors present)

THE COURT: Mr. Foreman, has the jury agreed upon a verdict?

THE FOREMAN: Yes, it has.

THE CLERK: How do you find as to count 1?

THE FOREMAN: Guilty.

THE CLERK: How do you find as to count 2?

THE FOREMAN: Guilty.

THE CLERK: And how do you find as to count 3?

THE FOREMAN: Guilty.

THE COURT: Will you poll the jury, please, Mr. Clerk.

THE CLERK: Members of the jury, you say you find the defendant guilty as to count 1, guilty as to count 2, and guilty as to count 3.

(To the question, "Is that your verdict?" all jurors answered in the affirmative.)

THE COURT: Now, Mr. Foreman, ladies and gentlemen of the jury: Before I discharge you with the thanks of the Court, I'll make my two habitual explanations or statements. First, as the presiding judge, I never comment on the verdict of a jury. Therefore, the fact that I do not comment on your verdict means absolutely nothing. I never comment on any verdict.

Second, I feel very strongly that when citizens come in to help us in the administration of justice as jurors, they are entitled among other things to the privacy

JUDGMENT AND COMMITMENT

JUDGMENT AND COMMITMENT

F. VIRELLA, A.U.S.A.

nited States of America vs.

United States District Court for

DEFENDANT: ~~ALPHONSO C. POWE, Jr.~~

SOUTHERN DISTRICT OF NEW YORK

DOCKET NO. SDNY 75 Cr. 413 I.B.W

JUDGMENT AND PROBATION/COMMITMENT ORDER (AO 245 10/74)

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: SEPT. DAY: 5 YEAR: 1975

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL HOWARD M. SCHWINGER, ESQ. (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of
[ ] NOT GUILTY. Defendant is discharged
[X] GUILTY.

Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully and knowingly, did aid, abet, counsel, command, induce, procure and cause an employee of an insured bank, to unlawfully embezzel, abstract and purloin moneys insured by the Federal Deposit Insurance Corporation, and did transport and cause to be transported in interstate commerce, money knowing the same to have been stolen, converted and taken by fraud,

and

conspiracy so to do.

(Title 18, U.S.C. Sections 371, 656 and 2, 2314 and 2.)

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

THREE (3) YEARS, on each of counts 1 and 2, to run concurrently with each other. Imposition of sentence on count 3, is suspended, and defendant is placed on probation for a period of THREE (3) YEARS, subject to the standing probation order of this Court.

Special condition of probation being that defendant make restitution, at such time and in such amounts as the probation office may dertermine.

SPECIAL CONDITIONS OF PROBATION

MICROFILM
SEP 9 1975

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

Inzer B Wyatt

INZER B. WYATT, D.J.

Date SEPT. 5, 1975

U.S. DISTRICT COURT
FILED
SEP 5 1975
S.D. OF N.Y.

EXTRACTS OF TRIAL TRANSCRIPT

ask that the Court make a ruling after Patricia Carter testifies to determine whether or not that material falls under 3500 material or Brady material.

THE COURT: I don't rule on Brady material. I'll show it to you and you can make your own decision as to whether it is Brady material. I'll rule on whether it's 3500 material.

You subpoenaed the material, I'll give it to you. No reason why the government should not have it. After she has testified the decision for me is simply does it relate to the subject matter of direct testimony. I can't decide that until I know what she is oging to testify to. Do you agree, Mr. Schwinger?

MR. SCHWINGER: Yes, sir.

MR. VIRELLA: The second item that the government requests the Court to rule on is the testimony of Patricia Carter regarding a prior similar act. We advised Mr. Schwinger on Friday by telephone about our intentions to introduce the evidence, if the Court permits the government to do so.

We submitted a memorandum to the Court. We set out our particular arguments in the memo that was handed up by the government.

THE COURT: I don't know that it is a prior

similar act. It doesn't seem to be similar, but it involves an offense committed by -- if the evidence is believed -- Patricia Carter and this defendant, and it's fairly close in point of time as I remember it, and I think it's clearly admissible.

I think I've got to tell the jury, or should tell the jury, that it's not being admitted to show any general bad or criminal character of the defendant, but only to show for the consideration of the jury his relationship with Carter and his intent or motive as to the offenses charged in the indictment.

Anything else?

MR. SCHWINGER: I strongly object to the introduction of that prior similar act. I feel it would prejudice the jury. There was never a criminal proceeding based upon that. It's just an allegation which is made by this witness. It's highly prejudicial.

THE COURT: All so-called similar offenses, Mr. Schwinger, have some degree of prejudice, but, as you know, I'm really required to admit it under most circumstances; and I have just been through this in the case I finished yesterday.

MR. SCHWINGER: The state court doesn't allow this. I don't believe they do. Not with the same

latitude. In fact, they keep it out because it would prejudice the jury in the determination of guilt or innocence.

THE COURT: But you've got a relationship, which you gentlemen can argue about, between Carter and this defendant, and this is in point of time fairly close to the offenses charged and it arguably could show motive, intent, and relationship with an alleged co-conspirator.

I think there is a long discussion of it in McCormick.

MR. VIRELLA: I think it's Section 172, your Honor.

MR. SCHWINGER: Powe may have been completely innocent in the money order situation. She may have just brought him the money order.

THE COURT: I'm not going to charge on the facts. It's for the jury whether they believe it or not.

MR. SCHWINGER: It's dangerous. Which are they trying, the bank or bank embezzlement or the postal money order situation?

THE COURT: They are trying the bank embezzlement I can tell the jury that.

All right.

MR. VIRELLA: Your Honor, the government has

Bank?

A Yes, I did.

Q Directing your attention to the early part of 1973, January, did you and Alex Thompson have any discussions about your job?

A Yes, we did.

Q Where was this?

A In 925 Prospect Place in Brooklyn.

Q Who lived there?

A Alex Thompson.

Q By the way, did you find out what his true name was?

A At this time, no.

Q Can you tell us what he said to you and what you said to him in this conversation?

A We had a discussion on how I could take some money out of the bank and it got to the point where we discussed money orders, and he said to me, "Why don't you just make out a money order for a certain amount?"

So I said, "Well, what's the amount?"

And he told me, "Well, I need $800. Just about $800."

So after discussion on this, we finally went through with the plan. He would cut his hair. He would

wear glasses to the bank and a raincoat, trench coat, and he would come up to my teller's cage and ask for an $800 money order.

Q Did you agree to do this?

A Yes, I did.

Q Can you tell us what happened after this conversation?

A Well, a few days later, at around at the time -- I don't remember what time. It was in the day. It was early. Alex came up to my teller's cage and I was there and he asked me for an $800 money order. I made out the money order and I handed it to him over my window and I didn't go through regular proceedings of -- which I should have. When it came to making out money orders, I didn't take my receipt. That night when it came down to prove the receipt from -- the money order was missing but no one knew the amount at this time.

Q I show you what has been marked as Government's Exhibit No. 13 for identification and ask you if you can identify it.

A Yes.

Q How can you identify it?

A This is the money order which I gave him. Alex's name is on it and that is his printing.

Q Can you tell us what it is?

A It is Chemical Bank money order.

Q Did you do anything in that money order?

A I placed the figure of $800 on the money order.

MR. VIRELLA: The government would offer Government's Exhibit 13.

MR. SCHWINGER: I object to this. This is a photostatic copy of something or other -- of the bank check. Whre is the original?

THE COURT: Do you know where the original is, Miss Carter?

THE WITNESS: I presume in the -- the bank kept that.

THE COURT: The bank kept that?

THE WITNESS: Yes.

MR. SCHWINGER: I strongly object to the admission of this photostatic copy in evidence.

THE COURT: I will permit it.

Do you recognize this as a true copy of the original?

THE WITNESS: Yes.

THE COURT: Overruled. Mark it.

(Government's Exhibit 13 received in evidence.)

THE COURT: Mr. Foreman, ladies and gentlemen

of the jury:

You will understand that this incident of the $800 money order is not one of the charges in the indictment. The defendant, Mr. Powe, is not here on trial for any offense involving the money order. But I have admitted this evidence because the government will argue that this evidence shows the commission by the defendant Powe of an offense with Miss Carter shortly before the three offenses charged in the indictment here on trial. This evidence is not admitted and should not be considered by the jury as evidence showing that the defendant Powe had a general bad or criminal character or that he in fact committed the offenses with which he is here charged.

The evidence as to this alleged other offense involving the money order is only admitted for you to consider, if you believe it, in connection with the relationship between Miss Carter and the defendant Powe and as to the defendant Powe's intent or motive or knowledge in respect of the three offenses which are here on trial for a plan with Patricia Carter, Miss Carter, the witness, in those three offenses.

Q Now, Miss Carter, directing your attention to the latter part of July 1973, were you still seeing Mr. Thompson?

THE COURT: There is nothing before me at the moment. Are you going to offer these?

MR. VIRELLA: Yes.

THE COURT: Show them to Mr. Schwinger.

MR. SCHWINGER: I object to this. It's not covered by the indictment. It relates to a period subsequent to the --

MR. VIRELLA: I object to any legal argument that counsel is making.

THE COURT: Your objection is overruled and also the objection to the exhibits is overruled. It will be admitted.

*** (Government's Exhibits 3 and 4 for identification received in evidence.)

Q Miss Carter, you saw Mr. Thompson using the name "Lewis Davis" signing both of these documents; is that correct?

A Yes.

Q Can you tell us what happened in the apartment? What, if anything, did you do?

A Well, I think after we moved in, we just got the apartment together. I did. I cleaned up and everything and we just --

Q Will you please speak up.

A After we moved into the apartment, I cleaned it up and, you know, just proceeded to do regular -- just household chores in it.

MR. SCHWINGER: I object to this. I object to this question.

THE COURT: Yes, I sustain the objection. We've gone far enough now.

MR. SCHWINGER: Once again I ask to limit the evidence.

THE COURT: I sustained your objection. Nothing pending.

MR. SCHWINGER: Thank you, sir.

Q Did there come a time when you had a conversation with Mr. Thompson or Mr. Davis about the money?

A Yes.

MR. SCHWINGER: I object.

THE COURT: When was this conversation about the money?

MR. SCHWINGER: What time? When was that?

THE COURT: We'll get to that. I don't care what time it is.

Q In the month of September 1973, did you have a conversation with Mr. Thompson -- Mr. Davis -- about the money?

A Yes, we did. This time Alex confronted me that we needed a car, so I said, "Well, yes, it will be nice to have a car, you know, a nice car to use."

So like he made the suggestion to me that he wanted to get a car with his initials. I said, "What's that?"

He said, "L.D." He said "Eldorado." He said, "Get a nice Eldorado Cadillac."

I said, "Those cars run from eight to ten thousand dollars "

fter a few arguments he got his way. He went the next day to purchase the car.

MR. SCHWINGER: I object. The business with the car has nothing to do with the indictment.

THE COURT: No, it has to do.

Did he put the initials "L.D." on it?

THE WITNESS: No, he didn't.

THE COURT: The conversation was that he was going to put initials "L.D." on it?

THE WITNESS: No, he asked. That is the discussion that we had in 1973 of September. And the big discussion of money at that time was the car; biggest discussion of money at that time was the car.

THE COURT: I'll sustain the objection then.

Let's go on.

Q Now, did there come a time when Mr. Thompson purchased an automobile?

A Yes.

MR. SCHWINGER: I object.

THE COURT: Yes, sustained. This is all irrelevant. Let's go on.

MR. VIRELLA: Can we have a side bar?

THE COURT: All right, quickly.

(At the side bar)

THE COURT: What has any of this got to do with the offenses charged? Totally irrelevant.

MR. VIRELLA: This is probative of the defendant's possession of the money.

THE COURT: You've already proved he had possession of the money.

MR. VIRELLA: That he used it to purchase an automobile in September. We will further prove that he purchased $9,000 worth of vending machines with the money.

THE COURT: What has that got to do with it?

MR. VIRELLA: Probative that he possessed it. It is going to be corroborated that he possessed it.

MR. SCHWINGER: The indictment takes you right up to their arrival in Oakland. What happened thereafter

has no relevance to the charges.

MR. VIRELLA: There are cases we submitted in a memo, cases that go four or five months that go -- evidence of the defendant's possession of stolen goods or money four or five months after the actual theft is permissible so the jury can have -- well, at least infer such use of the money.

MR. SCHWINGER: It is prejudicial and it doesn't really --

THE COURT: How much of this evidence is there? Is it that you say that the evidence will show that this witness had possession of the money?

MR. VIRELLA: Yes.

THE COURT: She kept the money?

MR. VIRELLA: And he controlled the use of the money and in purchasing the Cadillac for seven, eight thousand and the vending machines for $9,000.

THE COURT: In the apartment in Oakland, California, what does the government's evidence suggest as to the possession of the money; who had it, she or he?

MR. VIRELLA: That he had it and slept over it on the bed; had it under the bed.

THE COURT: Ask her what became of the money, who had it.

MR. VIRELLA: Can I also ask the question, just those two questions about the Cadillac and vending machines?

THE COURT: If you prove that he had possession of it, what difference does it make what he did with it?

MR. VIRELLA: It shows that he had controlling possession of it, that he used it, and further to corroborate the witness' testimony that he was the man behind this.

THE COURT: It's the use of the money to buy a car and vending machines; is that right?

MR. VIRELLA: That is right.

THE COURT: I'll permit it. Let's go on. Overruled.

(In open court)

Q Miss Carter, directing your attention to the apartment, who had the money?

A The apartment was in the house -- in the apartment the money stayed and whenever, you know, it was there it stayed on Alex's side of the bed.

Q In the early part of September 1973, you had a conversation with Mr. Thompson about the money, what to do with the money; is that correct?

A Yes.

Q And you were testifying about a Cadillac, is that correct?

MR. VIRELLA: We gave the 3500 material to counsel at the start of the morning.

THE COURT: Can you ask Miss Carter to remain until after lunch?

MR. SCHWINGER: Thank you very much.

THE COURT: I'm on a very tight schedule. I finished a case yesterday and I had to start this today. As you know, I had to put this off.

MR. SCHWINGER: One thing I'd like to note for the record, my objection to the prior similar act. I want it on the record that I objected to it. If some appeal attorney wants to make a record of it, I will have set the stage.

THE COURT: Yes, the record will show it. What is it that you are telling me about giving something else to defense counsel, Mr. Virella?

MR. VIRELLA: We are of the impression, your Honor, that the psychiatric reporting examination of Miss Carter would be 3500 material.

THE COURT: All right. If you want to give it to him, let the record show that you are giving it to him.

All right.

MR. VIRELLA: Yes.

THE COURT: We will have to stop. Have the rest

MR. VIRELLA: Your Honor, may we have one moment, please?

THE COURT: All right.

(Pause)

MR. VIRELLA: Your Honor, the government rests.

THE COURT: All right, the defendant.

MR. SCHWINGER: All right. I'd like to make a motion.

THE COURT: All right. You want to make it at the side bar?

(At the side bar)

MR. SCHWINGER: My motion is for judgment of acquittal under Rule 29, first on the basis of jurisdiction. The employee produced, the bank employee had no personal knowledge of what the situation was between the Chemical Bank and the FDIC. That is my first motion.

THE COURT: Motion is denied.

MR. SCHWINGER: My second motion is for a dismissal of the third count. The third count is transportation of stolen property in interstate commerce; and the property, which in this case would be the money, was not produced, no corpus delicti.

THE COURT: Motion is denied.

MR. SCHWINGER: And the last motion is the same

motion for judgment of acquittal on the grounds that the evidence offered by the government is insufficient to sustain a judgment of conviction.

THE COURT: Motion is denied.

MR. SCHWINGER: No other motions.

THE COURT: All right.

(In open court, jury present)

MR. SCHWINGER: Your Honor, I'm going to call Mr. Powe.

A Yes.

Q And Alex Thompson was the name that you used under those two accounts; is that correct?

A I can remember the checking account. I can't remember if it was Alphonso Powe or Alex Thompson on the savings account. You know, I don't remember which name was on the savings account.

Q Did you have any reason for using a different name?

A Yes. Yes. My name, it is very difficult to pronounce. Through school and friends they pronounce the name wrong, the first name and last name, and I used to get a little uptight about it, so I just would use a simple name that is very easy to pronounce and spell.

Q Did you have a bank account in Oakland?

A Yes. Yes, I did.

Q When you met Patricia Carter, you testified on direct examination, she told you on one occasion that she had discussions with other people about cashing checks and things like that.

A Not when I met her.

Q When you knew her?

A Yes, when I knew her. In general conversation she would tell me she met some fellows who was talking

bank business with her. One wanted to try to get her to cash a $20,000 check.

Q Who?

A She didn't tell me the names. She just said a few fellows she had met. Another fellow had some type of -- another check he wanted her to cash for him.

Q Who was that?

A She never mentioned any names as far as the fellows. She just would tell me what they were trying to get her to do because they knew she was working in the bank.

Q And you also knew that she was working in the bank; is that correct?

A Yes.

Q Directing your attention to January of 1973 and the early part of February, did you receive a money order from Patricia Carter in the amount of $800?

A I can't remember the date, but she did give me a money order, yes.

Q Can you explain the circumstances under which she gave you that money order?

A She told me, she constantly told me she was having problems with her family. She wanted to get an apartment and she gave me this money order so she could -- I would cash

it for her, you know, give her some money so she could get this apartment.

Q What happened after this conversation?

A Well, she gave me the money order. I deposited it in my checking account, to the Manufacturers Hanover checking account.

Q Did you know it was stolen?

A No.

THE COURT: Where did she give it to you?

THE WITNESS: She gave it to me in my house.

THE COURT: In your house?

THE WITNESS: Yes.

Q And you knew it was stolen?

A No, I did not know it was stolen.

Q Did she explain to you why she wanted to give it to you-- she couldn't cash it herself?

A Well, I had told her, I had said, "Look, you're busy in the bank, you know. Why don't you just cash it yourself?"

She told me that some type of policy in the bank where she can't cash it, you know. She can't cash it in that bank or she is not supposed to cash it in that bank.

Q Do you know who Robert Fisher is?

A No. I believe that was the name that I put on that

money order.

Q You filled out the money order; correct?

A Yes.

Q She didn't fill it out?

A No.

Q I show you Government Exhibit No. 13 in evidence. Do you recognize that?

A Yes, sir.

Q And you filled out that money order; is that correct?

A Yes.

Q And you deposited it in yoiur bank account?

A Yes.

Q What happened with the money?

A I never received the money. They closed my account. They told me --

Q They closed your account?

A Yes, they did. They told me that the money order was no good.

Q Did you speak to a man by the name of Carl Davis about this money order?

A I'm not -- I'm not familiar with the name Carl Davis.

THE COURT: Mr. Powe, who is this man Fisher

whose name you mentioned?

THE WITNESS: That is just a name I put on the money order.

THE COURT: Is there a Robert Fisher?

THE WITNESS: That was a fictitious name.

THE COURT: You mean you just made it up?

THE WITNESS: Yes, sir, I put -- when I put my name on that money order it had another space for, you know, another name and she didn't want me to put her name on it, so I put Robert Fisher on it.

THE COURT: Why didn't you put your name on it?

THE WITNESS: I did put my name on it when I deposited it in my bank.

THE COURT: Why did you need Robert Fisher?

THE WITNESS: It has got another space down here for a name. She didn't want me to put her name showing it came from her, so that is why I put the Robert Fisher.

Q Did she tell you that?

A Yes.

Q To put Robert Fisher?

A She just said "Put another name down there."

THE COURT: Whose money did you think the $800 was?

THE WITNESS: Well, I thought it was her money.

THE COURT: If it was her money, why didn't she

mcbr 8 Powe-cross

use her own name?

THE WITNESS: I don't know, your Honor. I don't know.

THE COURT: All right.

THE WITNESS: She just said she couldn't cash it at her bank and she told me to cash it.

Q Mr. Powe, how old are you?

A I'm 26.

Q You are 26?

A Yes.

Q Did you ever tell Patricia Carter you were 27 when you first met her?

A I don't remember.

Q If you had any college education?

A No, not officially. I have been to college, you know, only to sit in on classes, that is all.

Q Do you remember filling out work applications and stating on these applications that you had one year of college?

MR. SCHWINGER: I object. This question seems to be completely irrlevant to the charges.

THE COURT: No, I will permit it.

A I might have filled out an application stating that I have been to college.

HENRY J. BOITEL, being an attorney admitted to practice in the Courts of the State of New York and in the United States Court of Appeals for the Second Circuit, hereby certifies that on November 19, 1976, he mailed a copy of the brief and appendix in behalf of the appellant Alphonso C. Powe, Jr., (Docket No. 76-1336) to the United States Attorney for the Southern District of New York, by first class mail in a properly enclosed wrapper.

HENRY J. BOITEL

November 19, 1976
New York, New York